

Introduced by Senator Dunn

February 21, 2003

An act to amend Section 1538.5 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

SB 718, as introduced, Dunn. Criminal procedure.

Under existing law, a defendant in a criminal case may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure based on specified grounds. Existing law requires this motion to be in writing, and to be accompanied by a memorandum of points and authorities listing the specific items of property or evidence sought to be returned or suppressed and setting forth the factual basis and legal authorities that demonstrate why the motion shall be granted. The California Supreme Court has held that a prima facie showing by a defendant that a search was warrantless requires the prosecution to offer a justification for the search, which then requires the defendant to present arguments as to why that justification is inadequate. The court held that defendants need only be specific enough to give the prosecution and court reasonable notice, as long as defendants are not completely silent about an issue the prosecution may have overlooked.

This bill would require a motion to return property or suppress evidence to precisely identify the law enforcement or other governmental conduct that is challenged by the motion.

Existing law provides that, whenever a search or seizure motion is made as specified, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

This bill would limit the evidentiary hearing concerning a motion alleging unlawful search or seizure to the law enforcement or other governmental conduct that has been precisely identified in the defendant's motion.

This bill would also make technical and conforming changes in the statute specifying procedures for search and seizure motions, and would make its changes apply to all criminal proceedings conducted on or after January 1, 2004.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. It is the intent of the Legislature in enacting this
2 act to clarify pleading requirements in motions to return property
3 or to suppress evidence in criminal cases. It is the further intent of
4 the Legislature in enacting this act to overrule the decision of the
5 California Supreme Court in *People v. Williams* (1999) 20 Cal.4th
6 119, insofar as it has been construed to hold that a motion to return
7 property or to suppress evidence need not identify with precision
8 the law enforcement or other governmental conduct that is
9 challenged by the motion. However, nothing in this act shall be
10 construed to abrogate the holding in *Badillo v. Superior Court*
11 (1956) 46 Cal.2d 269, that the prosecution bears the burden of
12 proving that a search or seizure without a warrant is lawful.

13 SEC. 2. Section 1538.5 of the Penal Code is amended to read:
14 1538.5. (a) (1) A defendant may move for the return of
15 property or to suppress as evidence any tangible or intangible thing
16 obtained as a result of a search or seizure on either of the following
17 grounds:

18 (A) The search or seizure without a warrant was unreasonable.

19 (B) The search or seizure with a warrant was unreasonable
20 because any of the following apply:

21 (i) The warrant is insufficient on its face.

22 (ii) The property or evidence obtained is not that described in
23 the warrant.

24 (iii) There was not probable cause for the issuance of the
25 warrant.

26 (iv) The method of execution of the warrant violated federal or
27 state constitutional standards.



1 (v) There was any other violation of federal or state
2 constitutional standards.

3 (2) A motion pursuant to paragraph (1) shall be made in
4 writing, *shall precisely identify the law enforcement or other*
5 *governmental conduct that is challenged by the motion*, and shall
6 be accompanied by a memorandum of points and authorities and
7 proof of service. The memorandum shall list the specific items of
8 property or evidence sought to be returned or suppressed and shall
9 set forth the factual basis and the legal authorities that demonstrate
10 why the motion should be granted.

11 (b) When consistent with the procedures set forth in this section
12 and subject to the provisions of Sections 170 to 170.6, inclusive,
13 of the Code of Civil Procedure, ~~the~~ *a motion that challenges a*
14 *search or seizure pursuant to a search warrant* should first be
15 heard by the magistrate who issued the search warrant ~~if there is~~
16 ~~a warrant~~.

17 (c) (1) Whenever a search or seizure motion is made ~~in the~~
18 ~~superior court~~ as provided in this section, the judge or magistrate
19 shall receive evidence on any issue of fact necessary to determine
20 the motion. *However, this evidentiary hearing shall be limited to*
21 *the law enforcement or other governmental conduct that has been*
22 *precisely identified in the defendant's motion*.

23 (2) While a witness is under examination during a hearing
24 pursuant to a search or seizure motion, the judge or magistrate
25 shall, upon motion of either party, do any of the following:

26 (A) Exclude all potential and actual witnesses who have not
27 been examined.

28 (B) Order the witnesses not to converse with each other until
29 they are all examined.

30 (C) Order, where feasible, that the witnesses be kept separated
31 from each other until they are all examined.

32 (D) Hold a hearing, on the record, to determine if the person
33 sought to be excluded is, in fact, a person excludable under this
34 section.

35 (3) Either party may challenge the exclusion of any person
36 under paragraph (2).

37 (4) Paragraph (2) does not apply to the investigating officer or
38 the investigator for the defendant, nor does it apply to officers
39 having custody of persons brought before the court.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, 1238, or 1466 are utilized by the people.

(e) (1) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. ~~If~~

(2) If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section, Section 1238 or 1466, the property is not subject to lawful detention, or if the time for initiating the proceedings has expired, whichever occurs last. ~~If~~

(3) If the motion is granted at a preliminary ~~hearing examination~~, the property shall be returned upon order of *the magistrate or* the court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5 or 1238 are utilized; ~~if they~~. *If proceedings authorized by this section, Section 871.5 or Section 1238 are utilized, the property shall be returned only if, after the conclusion of the proceedings, the property is no longer subject to lawful detention.*

(f) (1) If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made only upon *or after the* filing of an information, except that the defendant may make the motion at the preliminary ~~hearing examination~~, but the motion shall be restricted to evidence sought to be introduced by the people at the preliminary ~~hearing examination~~.

(2) The motion may be made at the preliminary examination only if, at least five court days before the date set for the preliminary examination, the defendant has filed and personally served on the people a written motion accompanied by a memorandum of points and authorities ~~as required by~~ *described in paragraph (2) of subdivision (a).* At the preliminary examination, the magistrate may grant the defendant a continuance for the purpose of filing ~~the motion~~ and serving *upon the people* the motion ~~upon the people and the accompanying memorandum~~, at least five court days before resumption of the examination, upon a showing that the defendant or his or her

1 attorney of record was not aware of the evidence or was not aware
2 of the grounds for suppression before the preliminary
3 examination.

4 (3) Any written response by the people to the motion described
5 in paragraph (2) shall be filed with *the magistrate or* the court and
6 personally served on the defendant or his or her attorney of record
7 at least two court days prior to the hearing at which the motion is
8 to be made.

9 (g) If the property or evidence relates to a misdemeanor
10 complaint, the motion shall be made before trial and heard prior
11 to trial at a special hearing relating to the ~~validity~~ *lawfulness* of the
12 search or seizure. If the property or evidence relates to a
13 misdemeanor filed together with a felony, the procedure provided
14 for a felony in this section and Sections 1238 and 1539 shall be
15 applicable.

16 (h) If, prior to the trial of a felony or misdemeanor, opportunity
17 for this motion did not exist or the defendant was not aware of the
18 grounds for the motion, the defendant shall have the right to make
19 this motion during the course of trial.

20 (i) If the property or evidence obtained relates to a felony
21 offense initiated by complaint and the defendant was held to
22 answer at the preliminary ~~hearing~~ *examination*, or if the property
23 or evidence relates to a felony offense initiated by indictment, the
24 defendant shall have the right to renew or make the motion at a
25 special hearing relating to the ~~validity~~ *lawfulness* of the search or
26 seizure which shall be heard prior to trial and at least 10 court days
27 ~~after notice to the people~~ *the defendant has filed and personally*
28 *served upon the people the motion and memorandum described in*
29 *paragraph 2 of subdivision (a)*, unless the people are willing to
30 waive a portion of this time. Any written response by the people
31 to the motion shall be filed with the court and personally served on
32 the defendant or his or her attorney of record at least two court days
33 prior to the hearing, unless the defendant is willing to waive a
34 portion of this time. If the offense was initiated by indictment or
35 if the offense was initiated by complaint and no motion was made
36 at the preliminary ~~hearing~~ *examination*, the defendant shall have
37 the right to fully litigate the ~~validity~~ *lawfulness* of a search or
38 seizure on the basis of the evidence presented at a special hearing.
39 If the motion was made at the preliminary ~~hearing~~ *examination*,
40 unless otherwise agreed to by all parties, evidence presented at the

1 special hearing shall be limited to the transcript of the preliminary
2 ~~hearing~~ examination and to evidence that could not reasonably
3 have been presented at the preliminary ~~hearing~~ examination,
4 except that the people may recall witnesses who testified at the
5 preliminary ~~hearing~~ examination. If the people object to the
6 presentation of evidence at the special hearing on the grounds that
7 the evidence could reasonably have been presented at the
8 preliminary ~~hearing~~ examination, the defendant shall be entitled
9 to an in camera hearing to determine that issue. The court shall
10 base its ruling on all evidence presented at the special hearing and
11 on the transcript of the preliminary ~~hearing~~ examination, and the
12 findings of the magistrate shall be binding on the court as to
13 evidence or property not affected by evidence presented at the
14 special hearing. After the special hearing is held, any review
15 thereafter desired by the defendant prior to trial shall be by means
16 of an extraordinary writ of mandate or prohibition filed within 30
17 days after the denial of his or her motion at the special hearing.

18 (j) (1) If the property or evidence relates to a felony offense
19 initiated by complaint and the defendant's motion for the return of
20 the property or suppression of the evidence at the preliminary
21 ~~hearing~~ examination is granted, and if the defendant is not held to
22 answer at the preliminary ~~hearing~~ examination, the people may
23 file a new complaint or seek an indictment after the preliminary
24 ~~hearing~~ examination, and the ruling at the prior hearing shall not
25 be binding in any subsequent proceeding, except as limited by
26 subdivision (p). In the alternative, the people may move to
27 reinstate the complaint, or those parts of the complaint for which
28 the defendant was not held to answer, pursuant to Section 871.5.
29 ~~If~~

30 (2) If the property or evidence relates to a felony offense
31 initiated by complaint and the defendant's motion for the return or
32 suppression of the property or evidence at the preliminary ~~hearing~~
33 examination is granted, and if the defendant is held to answer at the
34 preliminary ~~hearing~~ examination, the ruling at the preliminary
35 ~~hearing~~ examination shall be binding upon the people unless, upon
36 notice to the defendant and the court in which the preliminary
37 ~~hearing~~ examination was held and upon the filing of an
38 information, the people, within 15 days after the preliminary
39 ~~hearing~~ examination, request a special hearing, in which case the
40 ~~validity~~ lawfulness of the search or seizure shall be relitigated de



novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice.

~~¶~~

(3) *If* the defendant's motion is granted at a special hearing, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, or if ~~the people dismiss the case~~ *has been dismissed on their own* the motion *of the people* after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). ~~¶~~

(4) *If* the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the superior court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the appellate division, in accordance with the California Rules of Court provisions governing appeals to the appellate division in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) (1) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he or she is in custody and *shall not be* returned to custody unless the proceedings are resumed in the trial court and he or she is lawfully ordered by the court to be returned to custody.

(2) If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of

1 intention to file a petition, the defendant shall be released pursuant
2 to Section 1318, unless (1) he or she is charged with a capital
3 offense in a case where the proof is evident and the presumption
4 great, or (2) he or she is charged with a noncapital offense defined
5 in Chapter 1 (commencing with Section 187) of Title 8 of Part 1,
6 and the court orders that the defendant be discharged from actual
7 custody upon bail.

8 (l) (1) If the defendant's motion to return property or suppress
9 evidence is granted, the trial of a criminal case shall be stayed to
10 a specified date pending the termination in the appellate courts of
11 this state of the proceedings provided for in this section, Section
12 871.5, 1238, or 1466 and, except upon stipulation of the parties,
13 pending the time for the initiation of these proceedings. Upon the
14 termination of these proceedings, the defendant shall be brought
15 to trial as provided by Section 1382, and, subject to the provisions
16 of Section 1382, whenever the people have sought and been denied
17 appellate review pursuant to subdivision (o), the defendant shall
18 be entitled to have the action dismissed if he or she is not brought
19 to trial within 30 days of the date of the order that is the last denial
20 of the petition. ~~Nothing~~

21 (2) *Nothing* contained in this subdivision shall prohibit a court,
22 at the same time as it rules upon the search and seizure motion,
23 from dismissing a case pursuant to Section 1385 when the
24 dismissal is upon the court's own motion and is based upon an
25 order at the special hearing granting the defendant's motion to
26 return property or suppress evidence. ~~It~~

27 (3) *In* a misdemeanor case, the defendant shall be entitled to a
28 continuance of up to 30 days if he or she intends to file a motion
29 to return property or suppress evidence and needs this time to
30 prepare for the special hearing on the motion. In case of an appeal
31 by the defendant in a misdemeanor case from the denial of the
32 motion, he or she shall be entitled to bail as a matter of right, and,
33 in the discretion of the trial or appellate court, may be released on
34 his or her own recognizance pursuant to Section 1318. In the case
35 of an appeal by the defendant in a misdemeanor case from the
36 denial of the motion, the trial court may, in its discretion, order or
37 deny a stay of further proceedings pending disposition of the
38 appeal.

39 (m) The proceedings provided for in this section, and Sections
40 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive

1 remedies prior to conviction to test the unreasonableness of a
2 search or seizure where the person making the motion for the
3 return of property or the suppression of evidence is a defendant in
4 a criminal case and the property or thing has been offered or will
5 be offered as evidence against him or her. A defendant may seek
6 further review of the validity of a search or seizure on appeal from
7 a conviction in a criminal case notwithstanding the fact that the
8 judgment of conviction is predicated upon a plea of guilty. Review
9 on appeal may be obtained by the defendant provided that at some
10 stage of the proceedings prior to conviction he or she has moved
11 for the return of property or the suppression of the evidence.

12 (n) This section establishes only the procedure for suppression
13 of evidence and return of property, and does not establish or alter
14 any substantive ground for suppression of evidence or return of
15 property. Nothing contained in this section shall prohibit a person
16 from making a motion, otherwise permitted by law, to return
17 property, brought on the ground that the property obtained is
18 protected by the free speech and press provisions of the United
19 States and California Constitutions. Nothing in this section shall
20 be construed as altering (1) the law of standing to raise the issue
21 of an unreasonable search or seizure; (2) the law relating to the
22 status of the person conducting the search or seizure; (3) the law
23 relating to the burden of proof regarding the search or seizure; (4)
24 the law relating to the reasonableness of a search or seizure
25 regardless of any warrant that may have been utilized; or (5) the
26 procedure and law relating to a motion made pursuant to Section
27 871.5 or 995, or the procedures that may be initiated after the
28 granting or denial of a motion.

29 (o) Within 30 days after a defendant's motion is granted at a
30 special hearing in a felony case, the people may file a petition for
31 writ of mandate or prohibition in the court of appeal, seeking
32 appellate review of the ruling regarding the search or seizure
33 motion. If the trial of a criminal case is set for a date that is less than
34 30 days from the granting of a defendant's motion at a special
35 hearing in a felony case, the people, if they have not filed a petition
36 and wish to preserve their right to file a petition, shall file in the
37 superior court on or before the trial date or within 10 days after the
38 special hearing, whichever occurs ~~last~~ *later*, a notice of intention
39 to file a petition and shall serve a copy of the notice upon the
40 defendant.

- 1 (p) If a defendant's motion to return property or suppress
2 evidence in a felony matter has been granted twice, the people may
3 not file a new complaint or seek an indictment in order to relitigate
4 the motion or relitigate the matter de novo at a special hearing as
5 otherwise provided by subdivision (j), unless the people discover
6 additional evidence relating to the motion that was not reasonably
7 discoverable at the time of the second suppression hearing.
8 Relitigation of the motion shall be heard by the same judge who
9 granted the motion at the first hearing if the judge is available.
- 10 (q) The amendments to this section enacted in the 1997 portion
11 of the 1997–98 Regular Session of the Legislature shall apply to
12 all criminal proceedings conducted on or after January 1, 1998.
- 13 (r) *The amendments to this section enacted in the 2003 portion*
14 *of the 2003–04 Regular Session of the Legislature shall apply to*
15 *all criminal proceedings conducted on or after January 1, 2004.*

